

FILED
Clerk
District Court

SEP 29 2005

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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Attorney for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS**

ABELLANOSA, JOANNA, et.
al.,

Plaintiffs,

v.

**L & T INTERNATIONAL
CORPORATION,**

Defendant.

Civil Action No. 05-0010

**REQUEST FOR ENTRY OF
DEFAULT PURSUANT TO FED.
R. CIV. P. 55(a)**

Plaintiffs ask the Court to enter default of Defendant L&T Corporation for its failure to file an answer or respond to the Third, Fourth, Sixth, and Seventh Causes of Action of the Complaint as authorized by Federal Rule of Civil Procedure 55(a).

A. Procedural Background

1. On March 31, 2005, Plaintiffs filed a complaint containing seven (7)

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ORIGINAL

1 separate counts for relief.

2 2. On July 29, 2005, Defendant L&T Corporation was served with the
3 Summons and Complaint. *See Exhibit 1* hereto.

4 3. On or about August 9, 2005, Defendant's counsel requested and
5 counsels agreed that Defendant's answer/response may be filed and served by
6 September 1, 2005.

7 4. On September 1, 2005, Defendant, without filing an answer, filed a
8 Rule 12(b)(6) motion to dismiss directed at only three of the seven counts in the
9 Complaint. Defendant has not filed an answer or other responsive pleading to the
10 Third, Fourth, Sixth, and Seventh causes of action.

11 5. On September 2, 2005, as a courtesy, Plaintiffs' counsel first verbally
12 informed counsel for Defendant that the partial motion to dismiss was not proper
13 and that he should file an answer forthwith to those causes of action which are
14 not the subjects of Defendant's motion to dismiss.

15 6. Later in the day, September 2, 2005, Plaintiffs' counsel served
16 counsel for Defendant with a confirmation letter of the above. *See Exhibit 2*
17 hereto.

18 7. On September 3, 2005, counsel for Defendant, by letter, replied to
19 Plaintiff's counsel's letter, indicating that it was his position that his partial motion
20 to dismiss was authorized, and therefore Defendant's answer need not be filed
21

1 until after the Court rules on the Rule 12(b)(6) motion. *See* **Exhibit 3** hereto.

2 8. Plaintiffs are entitled to an entry of default with respect to the Third,
3 Fourth, Sixth, and Seventh causes of action of the Complaint which were not
4 responded to or contested in Defendant's Motion to Dismiss.

5
6 **B. Argument**

7 9. The clerk of the court may enter a default against a party who has
8 not filed a responsive pleading or otherwise defended the suit. Fed. R. Civ. P.
9 55(a).

10 10. The clerk should enter a default against Defendant because it did not
11 file an answer/response to the Third, Fourth, Sixth, and Seventh causes of action
12 of the Complaint within 20 days after the Summons and Complaint were served
13 on Defendant on July 29, 2005 pursuant to Fed. R. Civ. P. 12(a)(1)(A), or
14 alternatively 20 days after the agreed to September 1, 2005 extended date to file
15 the answer/response.

17 11. In Gerlach v. Michigan Bell Tel. Co., 448 F. Supp. 1168 (E.D. Mich.
18 1978), the Court was confronted with the issue of whether defendant must answer
19 certain counts in the complaint within 20 days after the service of the summons
20 and complaint pursuant to Fed. R. Civ. P. 12(a) even though the remaining counts
21 of the complaint were the subject of a pending motion to dismiss and therefore
22

1 need not be answered until 10 days after notice of the court's action on the
2 motion, pursuant to Fed. R. Civ. P. 12(a)(1). The *Gerlach* Court reasoned as
3 follows:

4 Defendant argues that it should be able to quickly
5 narrow the scope of a lawsuit to those claims really in
6 conflict before the court. While this court fully agrees
7 with defendant's argument, their proposition presents
8 no reason for delaying the progress of litigation with
9 respect to those counts of a complaint which are not
10 addressed by a motion filed under F.R.C.P. 12(b).
11 Separate counts are, by definition, independent bases
12 for a lawsuit and the parties are responsible to proceed
13 with litigation on those counts which are not
14 challenged by a motion under F.R.C.P. 12(b).
15 (Emphasis added)

16 Gerlach, 448 F. Supp. 1168.

17 12. One commentator pointing to the advantages of requiring an answer
18 to the remaining counts of a complaint where defendant filed a partial motion to
19 dismiss addressing certain, but not all, counts of a complaint observed as follows:

20 The major advantage of requiring a defendant to
21 answer the unchallenged counts of the complaint
22 within the 20-day time limit is that the plaintiff can
23 narrowly tailor its discovery requests, because the
defendant will be forced to admit or deny allegations
relevant to the unchallenged counts and assert any
defenses thereto. Requiring an answer to the
challenged counts within 20 days of service of the
summons and complaint is also consistent with the
rules' underlying policy that discovery is not
automatically stayed during the pendency of a motion.
A partial motion to dismiss often has the practical

1 effect of impeding, often paralyzing, the progress of
2 discovery, and the rules contemplate a steady - if not
3 swift - discovery pace.

4 Moreover, requiring an answer within 20 days of
5 service of the summons and complaint is consistent
6 with the rules' language that a plaintiff may commence
7 discovery against a party after service of the complaint
8 and summons upon that party, and not after the
9 defendant's filing of an answer. Although one might
10 argue that this language suggests that discovery may
11 proceed in the absence of an answer, a plaintiff can
12 commence more meaningful, narrowly tailored
13 discovery after reviewing a defendant's answer.
14 Clearly, more extensive and focused discovery occurs
15 after service of the answer, which informs the plaintiff
16 of the defendant's admissions, denials, and defenses.
17 Thus, the fact that discovery may be sought by the
18 plaintiff after service of the complaint and summons
19 does not militate in favor of interpreting Rule 12(a) to
20 permit a defendant to delay to answer to any
21 unchallenged counts.

22 Finally, requiring a defendant to answer the
23 unchallenged counts discourages the filing of a partial
motion to dismiss solely as a dilatory tactic, and
encourages expedient discovery. This, in turn, may
lead to an earlier resolution of the case, by way of
settlement or verdict, as the case is likely to be in a trial
posture sooner. (Emphasis added)

18 A "PARTIAL" MOTION TO DISMISS UNDER FEDERAL
19 RULE OF CIVIL PROCEDURE 12: YOU HAD BETTER ANSWER,
20 Scott L. Cagan, Florida Bar Journal/May 1992, pp. 83-84.

21 13. Although Mr. Cagan recognized the different and opposing views
22 among the jurisdictions, he adopted the more reasoned position that Rule 12(a)

1 should be interpreted as to require a defendant to answer the unchallenged counts
2 of a complaint within 20 days of service of the summons and complaint, and
3 reasoned thusly:

4 This interpretation is most consistent with the
5 underlying policies behind the Federal Rules of Civil
6 procedure, under which discovery is not automatically
7 stayed by the filing of a Rule 12 motion. Further, this
8 interpretation will promote efficient discovery by
9 enabling plaintiffs to commence immediately narrowly
10 tailored discovery and by preventing defendants from
11 unnecessarily delaying the progression of the law suit.
12 This conclusion also takes into account the practical
13 consideration that courts often do not resolve
14 motions to dismiss until several months after they are
15 briefed. Judicial economy is not served by delaying
16 discovery during the pendency of a motion to dismiss,
17 especially in view of the fact that it is hardly
18 burdensome for a defendant to answer the
19 unchallenged accounts. Finally, any hardships which
20 could result in particular cases can be raised by
21 defendants by appropriate motion and resolved on a
22 case-by-case basis.

23 Id.

14. Plaintiffs meet the procedural requirements for obtaining an entry
of default from the clerk as further demonstrated by the attached Declaration of
Joe Hill.

15. Defendant is not an infant, an incompetent person, or in the military
service. 50 U.S.C. App. §521(b)(1); Fed. R. Civ. P. 55(b)(1), (e).

\\

C. Conclusion

For the foregoing reasons, Plaintiffs ask the clerk to enter the default of Defendant as to the Third, Fourth, Sixth, and Seventh Causes of Action of the Complaint.

SIGNED this 29th day of September 2005.


JOE HILL
Attorney for Plaintiffs

civ.05.L&T.mot.default/mario

RETURN OF SERVICE

Service of the Summons and Complaint was made by me ¹	DATE July 29, 2005
AME OF SERVER MARIO N. CORPUS	TITLE PARALEGAL

heck one box below to indicate appropriate method of service

☐ Served personally upon the defendant. Place where served: _____

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

Name of person with whom the summons and complaint were left: _____

☐ Returned unexecuted: _____

☒ Other (specify): Served on Atty. Steven Pixley, counsel for L & T

STATEMENT OF SERVICE FEES

AVEL	SERVICES	TOTAL
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DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 8-01-05
Date

MARIO N. CORPUS
Signature of Server

P.O. Box 500917, Saipan, MP 96950
Address of Server

Joe Hill
Hill Law Offices
P.O.Box 500917
Saipan, CM-MP 96950
(670) 234 6806/7743
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September 02, 2005

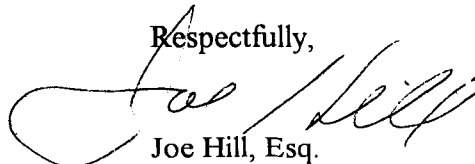
Mr. Colin M. Thompson, Esq.
Law Offices of Colin M. Thompson
J.E. Tenorio Building
PMB 917, Box 10001
Saipan, MP 96950

Re: Abellanos, et. al. v. L & T International Corporation
C.A. No. 05-0010

Dear Colin:

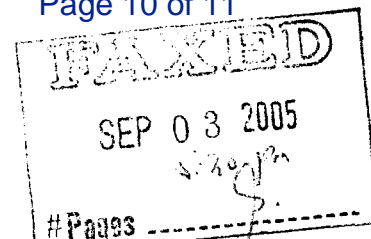
This is to confirm that, as a matter of courtesy, I suggested to you early today, September 2, 2005 at the U.S. District Court Clerk Office that your answer is due with respect to those causes of action which are not the subjects of the Motion to Dismiss which you filed on September 1, 2005 and that said answer should be filed forthwith.

Respectfully,



Joe Hill, Esq.

Colin M. Thompson
Attorney at Law



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September 3, 2005

Joe Hill, Esq.
Attorney at Law
P. O. Box 500917
Susupe, Saipan
MP 96950

Re: Abellanos et al. vs. L&T International Corporation
Civil Action No. 05-0010

Dear Joe,

Thank you for your letter dated September 1, 2005. I appreciate the courtesy. I do not, however, agree with your conclusion.

Researching whether the filing of a motion to dismiss some, but not all causes of action, enlarges the time that a defendant has to file a responsive pleading leads to the following cases showing that Pursuant to Federal Rule of Civil Procedure Rule 12(a) (4) the answer in this case is not due until 10 days after the court rules on the motion to dismiss.

- Fed. R. Civ. P. 12(a)(4) states that if motion is filed pursuant to Fed. R. Civ. P. 12, time period allotted for responsive pleading is altered and such responsive pleadings shall be served within 10 days after notice of court action on motion. *Fid. Mortg. Corp. v Seattle Times Co.* (2003, WD Wash) 213 FRD 573, 32 Media L R 1094, summary judgment gr, claim dismissed, remanded (2004, WD Wash) 304 F Supp 2d 1270, 32 Media L R 1311.
- Rule 12(a) provides that service of Rule 12(b) motion, whether or not it goes to all claims in complaint, enlarges time for answering remaining portions of pleading. *Brocksopp Engineering, Inc. v Bach-Simpson, Ltd.* (1991, ED Wis) 136 FRD 485, 21 FR Serv 3d 205.
- Filing of motion to dismiss as to one count of complaint, tolled time for filing answer to remaining claim in complaint. *Godlewski v Affiliated Computer Servs.* (2002, ED Va) 210 FRD 571, 53 FR Serv 3d 1283.

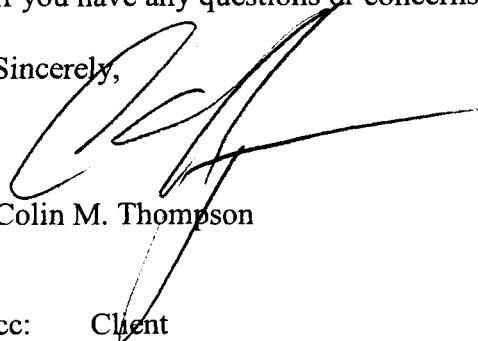
Letter to Joe Hill, Esq.
Re: Abellanosa et .al.
September 3, 2005
Pages 2 of 2

- Motion made under Rule 12 asserting that complaint fails to state claim upon which relief can be granted stops running of 20-day period referred to in Rule 12(a), and since defendant made such motion within prescribed period of time, he was not in default. Rudnicki v Sullivan (1960, DC Mass) 189 F Supp 714, 4 FR Serv 2d 107.

If you are aware of applicable authority contrary to the positions provide for in the above cases, please let me know. I will be away from Saipan until September 8, 2005.

If you have any questions or concerns, please give me a call.

Sincerely,



Colin M. Thompson

cc: Client
Steven P. Pixley

CMT/esl